



DEPARTMENT OF JUSTICE

28 CFR Part 16

[CPCLO Order No. 002-2023]

Privacy Act of 1974; Implementation

AGENCY: Office of Privacy and Civil Liberties, United States Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: In the notice section of today's Federal Register, the Office of Privacy and Civil Liberties (hereinafter OPCL), a component within the United States Department of Justice (DOJ or Department), has published a notice of a new system of records, Data Protection Review Court Records System, JUSTICE/OPCL-001. In this notice of proposed rulemaking, the OPCL proposes to exempt this system of records from certain provisions of the Privacy Act to protect national security and law enforcement sensitive information, preserve judicial independence, and ensure the integrity of adjudicatory records in cases before the Data Protection Review Court ("DPRC"). For the reasons provided below, the Department proposes to amend its Privacy Act regulations by establishing an exemption for records in this system from certain provisions of the Privacy Act. Public comment is invited.

DATES: Comments must be received by [INSERT DATE 30 AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may send comments by any of the following methods:

- E-mail: privacy.compliance@usdoj.gov. To ensure proper handling, please reference the CPCLO Order No. in the subject line of the message.
- Fax: 202-307-0693.
- Mail: United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, 145 N ST NE, Washington D.C. 20530. All comments

sent via regular or express mail will be considered timely if postmarked on the day the comment period closes. To ensure proper handling, please reference the CPCLO Order No. in your correspondence.

- Federal eRulemaking Portal: <https://www.regulations.gov>. When submitting comments electronically, you must include the CPCLO Order No. in the subject box. Please note that the Department is requesting that electronic comments be submitted before midnight Eastern Time on the day the comment period closes because <https://www.regulations.gov> terminates the public's ability to submit comments at that time. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received.

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at <https://www.regulations.gov> and in the Department's public docket. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "PERSONALLY IDENTIFIABLE INFORMATION" in the first paragraph of your comment. You must also place all personally identifiable information that you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential

business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personally identifiable information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, may be posted online and placed in the Department's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Katherine Harman-Stokes, Director (Acting), Office of Privacy and Civil Liberties, U.S. Department of Justice, Two Constitution Square, 145 N St., NE, Suite 8W-300, Washington, DC 20530; e-mail: *privacy.compliance@usdoj.gov*; telephone: (202) 514-0208; facsimile: (202) 307-0693.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, OPCL is establishing a new system of records, Data Protection Review Court Records System, JUSTICE/OPCL-001, to maintain an accurate record of the Data Protection Review Court (DPRC) review of determinations made by the Civil Liberties Protection Officer of the Office of the Director of National Intelligence (ODNI CLPO) in response to complaints that allege certain violations of United States law in the conduct of United States signals intelligence activities.

On October 7, 2022, the President of the United States issued Executive Order (E.O.) 14086, Enhancing Safeguards for United States Signals Intelligence Activities, 87 FR 62283 (Oct. 14, 2022), which directed the Attorney General to establish the Data Protection Review Court (DPRC) as the second level of a two-level redress mechanism for alleged violations of law regarding signals intelligence activities. The Attorney

General issued the regulation on October 7, 2022, now at 28 CFR 201, “Data Protection Review Court.” 87 FR 628303 (Oct. 14, 2022).

The first level of the new redress mechanism established by E.O. 14086 is the investigation, review, and determination by the ODNI CLPO of whether a covered violation occurred and, where necessary, the appropriate remediation in response to a complaint. The complainant or an element of the Intelligence Community may seek review by the DPRC of the ODNI CLPO’s determination.

Exercising the Attorney General’s authority under 28 U.S.C. 511 and 512 to provide his advice and opinion on questions of law and the authority delegated to the Attorney General under E.O. 14086, the DPRC will review whether the ODNI CLPO’s determination regarding the occurrence of a covered violation was legally correct and supported by substantial evidence and whether, in the event of a covered violation, the ODNI CLPO’s determination as to the appropriate remediation was consistent with E.O. 14086.

The regulations require the DPRC, and OPCL in support of the DPRC, to maintain all records relating to the DPRC’s review. For each application for review, OPCL shall maintain records of the information reviewed or created by the DPRC and the decision of the DPRC panel, which records shall be made available for consideration as non-binding precedent to future DPRC panels considering applications for review. 28 CFR 201.9(j), *see also* 28 CFR 201.5, et seq. Records of the DPRC’s review will include material created by the complainant, the public authority of a designated state, ODNI CLPO, elements of the Intelligence Community, DPRC Judges and Special Advocates, and Department of Justice personnel. Most of the information in this system consists of records that are classified, including the record of review received from the ODNI CLPO.

Pursuant to 28 CFR 201.9(i), certain classified information in the system indicating a violation of any authority subject to the oversight of the Foreign Intelligence

Surveillance Court (“FISC”) will be shared with the Assistant Attorney General for National Security, who shall report violations to the FISC as required by law and in accordance with its rules of procedure. Similarly, information in the system will be provided to the Privacy and Civil Liberties Oversight Board (“PCLOB”) as necessary to conduct the annual review of the redress process described in Section 3(e) of E.O. 14086, consistent with the protection of intelligence sources and methods.

II. Privacy Act Exemption

The Privacy Act allows Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including those that provide individuals with a right to request access to and amendment of records about the individual. If an agency intends to exempt a particular system of records, it must first issue a rulemaking pursuant to 5 U.S.C. 553(b)(1)– (3), (c), and (e). This proposed rule explains why an exemption is being claimed for this system of records and invites public comment, which the Department will consider before the issuance of a final rule implementing the exemptions.

The Department proposes to modify 28 CFR part 16 to add a new Privacy Act exemption for the new system of records, Data Protection Review Court Records System, JUSTICE/OPCL-001. The Department proposes this exemption because most of the records in this system will contain classified national security information, and as a result, notice, access, amendment, and disclosure (to include accounting for those records) to an individual, as well as certain record-keeping requirements, may cause damage to national security. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), authorizes agencies to claim an exemption for systems of records that contain information properly classified pursuant to applicable law. The Department is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements pursuant to

5 U.S.C. 552a(k)(1), to prevent disclosure of any information properly classified pursuant to applicable law.

The Department also proposes to exempt this system of records because these records relate to criminal law enforcement activities, and certain requirements of the Privacy Act may interfere with the effective execution of these activities and undermine good order and discipline. The Privacy Act, pursuant to 5 U.S.C. 552a(j)(2), authorizes agencies with a principal law enforcement function pertaining to the enforcement of criminal laws (including activities of prosecutors, courts, etc.) to claim an exemption for systems of records that contain information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled for the purpose of criminal law enforcement proceedings. Additionally, pursuant to 5 U.S.C. 552a(k)(2), agencies may exempt a system of records from certain provisions of the Privacy Act if it contains investigatory material compiled for law enforcement purposes, other than materials within the scope of 5 U.S.C. 552a(j)(2). The Department is proposing to claim exemptions from several provisions of the Privacy Act, pursuant to 5 U.S.C. 552a(j)(2) and 552a(k)(2), to prevent the harms articulated in this rule from occurring. Records in this system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record. A notice of a new system of records, Data Protection Review Court Records System, JUSTICE/OPCL-001, is published in this issue of the Federal Register.

Executive Orders 12866 and 13563—Regulatory Review

In accordance with 5 U.S.C. 552a(j) and 552a(k), this proposed action is subject to formal rulemaking procedures by giving interested persons an opportunity to participate in the rulemaking process “through submission of written data, views, or arguments,” pursuant to 5 U.S.C. 553. This proposed rulemaking proposes to exempt this system of records from certain provisions of the Privacy Act to protect national security

and law enforcement sensitive information, preserve judicial independence and to ensure the integrity of adjudicatory records in cases before the Data Protection Review Court (“DPRC”). This proposed rule is not a “significant” regulatory action under section 3(f) of E.O. 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under E.O. 12866. OPCL anticipates no costs or benefits accruing from this proposal.

Regulatory Flexibility Act

This proposed rule will impact records related to or reviewed in handling complaints in accordance with E.O. 14086 and DOJ regulation, 28 CFR 201, which are personal and generally do not apply to an individual’s entrepreneurial capacity, subject to limited exceptions. Even though this system will contain records that are not covered by the Privacy Act, the Chief Privacy and Civil Liberties Officer has nevertheless reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E– Congressional Review Act)

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, 5 U.S.C. 801 *et seq.*, requires the Department to comply with small entity requests for information and advice about compliance with statutes and regulations within the Department’s jurisdiction. Any small entity that has a question regarding this document may contact the person listed in **FOR FURTHER INFORMATION CONTACT**.

Persons can obtain further information regarding SBREFA on the Small Business Administration’s Web page at <https://www.sba.gov/advocacy>. This proposed rule is not a major rule as defined by 5 U.S.C. 804 of the Congressional Review Act.

Executive Order 13132–Federalism

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988–Civil Justice Reform

This proposed regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13175–Consultation and Coordination With Indian Tribal Governments

This proposed rule will have no implications for Indian Tribal governments. More specifically, it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Therefore, the consultation requirements of Executive Order 13175 do not apply.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000, as adjusted for inflation, or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires the Department to consider the impact of paperwork and other information collection

burdens imposed on the public. There are no current or new information collection requirements associated with this proposed rule.

List of Subjects in 28 CFR Part 16

Administrative Practices and Procedures, Courts, Freedom of Information, and the Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940-2008, the Department of Justice proposes to amend 28 CFR part 16 as follows:

PART 16-PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

Subpart E – Exemption of Records Systems Under the Privacy Act

2. Add § 16.139 to subpart E to read as follows:

§ 16.139 Exemption of the Department of Justice Data Protection Review Court Records System, JUSTICE/OPCL-001.

(a) The Department of Justice Data Protection Review Court system of records JUSTICE/OPCL-001 is exempted from subsections 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3) and (4); (e)(1), (2) and (3); (e)(4)(G), (H) and (I); (e)(5) and (8); (f) and (g) of the Privacy Act. These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j) or (k). Where DOJ determines that compliance would not appear to interfere with or adversely affect the purpose of this system to address certain violations of United States law in the conduct of United States signals intelligence activities, and not

interfere with national security or law enforcement operations, the applicable exemption may be waived by the DOJ in its sole discretion.

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From the subsection (c)(3) (accounting of disclosures) requirement that an accounting be made available to the named subject of a record, because this system is exempt from the access provisions of subsection (d). Where the individual is the subject of intelligence activities, to provide that individual with the disclosure accounting records would hinder authorized United States intelligence activities by informing that individual of the existence, nature, or scope of information that is properly classified pursuant to Executive Order 12958, as amended, and thereby cause damage to the national security. Revealing this information would also be contrary to Executive Order 14086 and could compromise ongoing, authorized law enforcement and intelligence efforts, particularly efforts to identify and/or mitigate national security threats.

(2) From subsection (c)(4) (notice of amendment to record recipients) notification requirements because this system is exempt from the access and amendment provisions of subsection (d) as well as the provision for making the accounting of disclosures available to an individual in subsection (c)(3). The DOJ takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of DOJ records, it will share that information in appropriate cases.

(3) From subsection (d)(1), (2), (3) and (4) (record subject's right to access and amend records), (e)(4)(G) and (H) (publication of procedures for notifying subjects of the existence of records about them and how they may access records and contest contents), (e)(8) (notice of compelled disclosures), (f) (agency rules

for notifying subjects to the existence of records about them, for accessing and amending records, and for assessing fees) and (g) (civil remedies) because these provisions concern individual access to and amendment of records containing national security, law enforcement, intelligence, counterintelligence and counterterrorism sensitive information that could alert the subject of an authorized law enforcement or intelligence activity about that particular activity and the interest of the DOJ and/or other law enforcement or intelligence agencies in the subject. Providing access could compromise information classified to protect national security; disclose information that would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; provide information that would allow a subject to avoid detection or apprehension; or constitute a potential danger to the health or safety of law enforcement personnel, confidential sources, witnesses, or other individuals. Nevertheless, DOJ has published notice concerning notification, access, and contest procedures because it may in certain circumstances determine it appropriate to provide subjects access to all or a portion of the records about them in a system of records, particularly if information pertaining to the individual has been declassified.

(4) From subsection (e)(1) (maintain only relevant and necessary records) because the DPRC in the course of receiving information pursuant to an application for review, including the ODNI CLPO's record of review, may receive records that are ultimately deemed irrelevant or unnecessary for the adjudication of the matter. Relevance and necessity are questions of judgment and timing; what appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after the information is assessed that its relevancy and necessity can be established. Even if the records received are ultimately determined to be irrelevant

or unnecessary to the adjudication of an application for review, the OPCL generally must nevertheless retain such records to maintain an accurate and complete record of the information reviewed by the DPRC.

(5) From subsection (e)(2) (collection directly from the individual) and (3) (provide Privacy Act Statement to subjects furnishing information). The DPRC will rely on records received from the ODNI CLPO, including records that the ODNI CLPO received from other elements of the Intelligence Community. The collection efforts of agencies that supply information ultimately received by the DPRC would be thwarted if the agencies were required to collect information with the subject's knowledge. Application of these provisions would put the subject of United States signals intelligence activities on notice of the signals intelligence activities and allow the subject an opportunity to engage in conduct intended to impede the investigative activity or avoid apprehension.

(6) From subsection (e)(4)(I) (identifying sources of records in the system of records), to the extent that this subsection is interpreted to require more detail regarding the record sources in this system than has been published in the Federal Register. Should the subsection be so interpreted, exemption from this provision is necessary to protect disclosure of properly classified national security and law enforcement sensitive information. Further, greater specificity of sources of properly classified records could compromise national security.

(7) From subsection (e)(5) (maintain timely, accurate, complete and up-to-date records) because many of the records in the system were derived from other domestic and foreign agency record systems over which DOJ exercises no control. It is often impossible to determine in advance if intelligence records contained in this system are accurate, relevant, timely and complete, but in the interest of maintaining a complete record of the information reviewed by the

DPRC in each case, it is necessary to retain this information. The restrictions imposed by paragraphs (e)(5) would impede development of the record for review and limit the DPRC's ability to exercise independent judgment in the adjudication of applications for review.

(8) Continue in effect and assert all exemptions claimed under 5 U.S.C. 552a(j) or (k) by an originating agency from which DOJ obtains records where the purposes underlying the original exemption remain valid and necessary to protect the contents of the record.

Dated: May 10, 2023.

Peter Winn,
Chief Privacy and Civil Liberties Officer (Acting),
United States Department of Justice.

[FR Doc. 2023-10525 Filed: 5/22/2023 8:45 am; Publication Date: 5/23/2023]